

Care Standards

The Tribunal Procedure (First-tier Tribunal) (Health, Education and Social Care) Rules 2008

[2014] 2242.EY-SUS

Mrs Katrina Sharp

Appellant

v

Ofsted

Respondent

Before;

**Mr Laurence Bennett (Tribunal Judge)
Ms Heather Reid
Mr Mike Flynn**

**Heard: 15 and 18 August 2014
Swindon Magistrates Court**

Deliberations: 22 August 2014

Appeal:

1. Mrs Katrina Sharp appeals against OFSTED's decision to suspend her registration as a Childminder operating as R D Sharp & Partners on the Early Years Register and the Childcare Register under Section 69 of the Childcare Act 2006 and the Childcare (Early Years and General Childcare Registers) (Common Provisions) Regulations 2008 from 9 July 2014 for a period of 6 weeks to 19 August 2014.

Restricted Reporting Order:

2. At the start of the hearing the Tribunal made a Restricted Reporting Order under Rule 14(1)(a) and (b) of The Tribunal Procedure (First-Tier Tribunal) (Health, Education and Social Care Chamber) Rules 2008 prohibiting the disclosure or publication of any documents or matter likely to lead members of the public to identify any child or family member in these proceedings so as to protect their private lives.

Attendance:

3. Mrs Sharp attended the hearing with Mrs Pauline Wileman, a supporter. Her witnesses were Mr Alistair Sharp, her husband, Ms Elizabeth Dennison, her mother and Mrs Louise Gillet, gardener and casual care employee.

4. OFSTED was represented by Mr Duncan Toole, Solicitor of PS Law. Its witnesses were Mrs Karen De-Lastie and Mrs Linda Du Preez both of OFSTED and Mrs Karen Godfrey and Mrs Dawn Smith, former Care Assistants.

Directions:

5. The appeal was made on 24 July 2014. Judge Melanie Plimmer made directions on 8 August 2014 after a telephone case management hearing.
6. In accordance with the directions the parties served their witness statements and the Respondent prepared a hearing bundle.
7. In accordance with directions made at the close of the hearing on 18 August 2014 the parties submitted written closing submissions.
8. The Tribunal convened without the parties to make its decision on 22 August 2014.

Background:

9. Mrs Sharp became a Registered Childminder in 2011. We were told at the hearing that at the time of the suspension she provided services for some 39 children in her home on a farm in rural surroundings.
10. Mrs Sharp submitted numerous letters expressing satisfaction and support from parents of children who are and have been in her care.
11. Mrs De-Lastie signed and attended in person to present the letter dated 9 July, delivered on 10 July 2014 giving notice of suspension. This followed information given to OFSTED by telephone from Mrs Godfrey and Mrs Smith from which OFSTED decided suspension was appropriate and to provide time for investigation.
12. At the start of the hearing Mr Toole referred the Tribunal to Mrs De-Lastie's statement found at page C1 of the bundle, particularly the bullet points in paragraph 23 which set out OFSTED's concerns. He and the OFSTED witnesses stated they were the basis of OFSTED's case.
 - "Acted inappropriately in restraining **Child A** causing unnecessary stress
 - Failed to make a safeguarding referral
 - Not kept parents properly informed about incidents and outings and had not been truthful
 - Failed to ensure that babies were properly supervised
 - Failed to ensure that premises remain suitable and therefore put children at risk
 - I confirmed that I believed that the accounts provided by Karen Godfrey and Dawn Smith were credible and there was no evidence which would indicate that there was any malicious intent."
13. Mr Toole and his witnesses confirmed that at the time of the hearing investigations had been completed and a notice of intention to cancel had been served. In view of the time of the hearing, the period of suspension appealed would expire before the outcome of the appeal was known. OFSTED would issue a further suspension notice but would review it in the light of the Tribunal's decision. At the time of the Tribunal's deliberations a further suspension notice had been served.

14. It was indicated in OFSTED's case summary that notice of intention of cancellation had been served although this appeared contrary to the information given at the hearing.
15. OFSTED's case summary states that following the suspension, visits were made to speak to Mrs Sharp to investigate the concerns mentioned by Mrs Godfrey and Mrs Smith in their telephone calls following their conversations with a common NVQ Assessor Ms Cheryl Jones. She advised they speak to OFSTED and subsequently telephoned them to ensure they had done so.
16. Mrs Sharp has misgivings about OFSTED's investigations and interviews particularly that they did not include all her answers within their notes. She considers incomplete remarks have been taken out of context and do not represent the position she stated. She was not interviewed under caution and felt that visits to spot check had been turned into extended interviews.
17. Both Mrs Smith and Mrs Godfrey were previously known to Mr and Mrs Sharp. The impression given from the parties' evidence was of a relatively close village atmosphere where they came across each other in child related activities including local community groups, primary school and other social contact. They appeared familiar with each other's extended families.
18. OFSTED have inspected Mrs Sharp's childcare; their report dated 12 April 2012 summarises: "Overall the quality of the provision is outstanding." Each separate aspect of inspection was graded 1. Mrs De-Lastie and Mrs du Preez considered that standards may have deteriorated when the business recently expanded to include babies.
19. Mrs De-Lastie and Mrs Du Preez stated at the hearing that individual grounds of concern might not have led to suspension but the number of concerns and the fact they were in marked contrast to the outstanding inspection led to the decision. Mrs De-Lastie suggested that if there been fewer concerns welfare requirement notices might have been served and/or further unannounced inspections might have taken place.
20. A reference was made to other agencies including the Local Authority Designated Officer. No other agency became involved or has taken action.

The Law

21. The statutory framework for the registration of childminders is provided under the 2006 Act. Section 69(1) of the Act provides for regulations to be made dealing with the suspension of a registered persons' registration. The section also provides that the regulations must include a right of appeal to the tribunal.
22. When deciding whether to suspend a childminder, the test is set out in regulation 9 of the 2008 Regulations as follows:

“that the Chief Inspector reasonably believes that the continued provision of childcare by the registered person to any child may expose such a child to a risk of harm.”

23. **“Harm”** is defined in regulation 13 as having the same definition as in section 31(9) of the Children Act 1989:

“ill-treatment or the impairment of health or development including, for example, impairment suffered from seeing or hearing the ill treatment of another”.

24. The suspension is for a period of six weeks. Suspension may be lifted at any time if the circumstances described in regulation 9 cease to exist. This imposes an ongoing obligation upon the respondent to monitor whether suspension is necessary.
25. The powers of the Tribunal are that it stands in the shoes of the Chief Inspector and so in relation to regulation 9 the question for the Tribunal is whether at the date of its decision it reasonably believes that the continued provision of child care by the registered person to any child may expose such a child to a risk of harm.
26. The burden of proof is on the respondent. The standard of proof **‘reasonable cause to believe’** falls somewhere between the balance of probability test and **‘reasonable cause to suspect’**. The belief is to be judged by whether a reasonable person, assumed to know the law and possessed of the information, would believe that a child might be at risk.
27. *Ofsted v GM & WM* [2009] UKUT 89 (AAC) provides helpful guidance on the proper approach to suspension pending investigation. The Upper Tribunal made it clear that they did not consider that in all cases, a suspension imposed while there is a police investigation need be maintained until that investigation is formally concluded and that Ofsted may be able to lift the suspension earlier [27] depending on the facts. If Ofsted wish to resist an appeal against a suspension on the ground that further investigations need to be carried out, it needs to make it clear to the Tribunal what those investigations are and what steps it might wish to take depending on the outcome of the investigations.

Evidence and submissions:

Child A

28. Child A (referred as Child 1) was aged around 8 months at the time of the incident reported. Both Mrs Smith and Mrs Godfrey said that they saw Mrs Sharp with her foot on Child A’s chest bouncing him vigorously in a “bouncy chair.” It was agreed at the hearing that the chair was that identified in a photograph. It has a springy wire frame with a 3 point harness. A copy of a concern summary completed by OFSTED shows details of a telephone call dated 9 July 2014 (C78): “On 02/07/2014 CM was trying to help child 1 go to sleep in a rocking chair. The CM then took child 1 out of the rocker and put the child into a bouncy chair. The caller said the CM then ‘put her foot on the baby’s tummy, with a strong hold and started rocking child 1 rapidly.’ Child 1 was clearly distressed. The caller said she was making tea and turned and saw and said ‘oh my god.’ The caller said the CM ‘gave a reason’ saying child 1 keeps sitting up and I want him to lay down. The caller described the action as ‘like shaking a baby.’ The caller said she thinks the CM was wearing footwear. The caller said that child 1 cries often but that she just rocks him in her arms however the CM ‘does not allow or like this to be done.’ The caller

said she was shocked but that she did not say anything and the CM continued to rock child 1 in this manner until he fell asleep for around 10 minutes. The caller says child 1 is not allowed to use a dummy at mums request but that the CM gives a dummy to child 1 to stop him crying or to child 1 help sleep." Additional comments were made about Child A referred to in the record as Child 1 whilst later in the garden and in respect of other incidents.

29. Mrs Smith set out in her statement that she saw Mrs Sharp had her foot on Child A's chest and was wearing a hard flip-flop. At the hearing she said that Child A was in a 5 point harness. Both she and Mrs Godfrey marked their respective positions at the time on plans of the kitchen. The plans do not agree.
30. Mrs Sharp commented that neither Mrs Smith nor Mrs Godfrey could have seen her foot from their marked positions and pointed to discrepancies in what they said. The chair has a 3 point harness. This incident did not occur. She has used her foot to rock a baby in a rocking chair using the side bar but not the bouncy chair.

Safeguarding referral

31. This relates to Child B. Mrs Sharp knows the family well and is god mother to Child B's sibling. Child B has Cerebral Palsy and is prescribed glasses and splints. Mrs Godfrey and Mrs Smith had several concerns including that Child B arrived without wearing her glasses and splints and was left regularly by her mother in her car for periods of 5 minutes whilst she came into the premises. Her hair was not always brushed nor her face always washed. They consider that Mrs Sharp should have made a safeguarding referral under the category of neglect.
32. Mrs Sharp accepts these observations but she is in regular contact with Child B's mother and has assisted her. Mrs Sharp judged it appropriate to help her manage her children. In line with safeguarding training Mrs Sharp arranged for a log of potential concerns in order to consider when a safeguarding referral might be appropriate.
33. Mrs De-Lastie and Mrs Du Preez acknowledged at the hearing that a decision to refer is a matter of professional judgement.

Parents' information

34. OFSTED considers that Mrs Sharp should have informed parents of incidents involving babies who managed to go beyond the front door into the porch. Mrs Sharp said that no baby had escaped save once Child C went beyond the porch door when it was wrongly left unlocked. At the time he was under the supervision of Mrs Smith who set out in her statement: "I looked out and saw the 2 babies crawling towards the edge of the driveway. I picked them up, brought them in and shut the door." Mrs Sharp said that the door should not have been left open; it happened after children had been collected from school by a colleague. Steps have been taken to ensure that this does not happen again. No child had escaped onto the gravel driveway. These incidents were not logged because a child had not gone beyond the outer door or been harmed and there was no reason to tell parents. She made a note for the parents of those boys who she had spoken to because they had left the door open.
35. Evidence was given about occasions when children were taken for lunch to the golf club where Mr Sharp was a steward. Mrs Sharp explained that Mr Sharp prepared

the lunches for the pupils. On occasion it was necessary to pick up the prepared sandwiches for the minded children because for one reason or another they had not been brought home the previous evening. On occasion children have eaten their sandwiches at the golf club. This was noted as a picnic because she considered that was the appropriate word to enable parents to understand the children were eating off the premises. She denied that she was assisting any golf club duties.

Supervision of babies

36. Mrs De-Lastie explained that a registered childminder has ultimate responsibility for the minded children notwithstanding delegation of supervision to staff. Children whilst cared for by staff such as Mrs Smith nevertheless remain Mrs Sharp's responsibility. As they had managed to go beyond the area of supervision this demonstrated a concern with Mrs Sharp's system of delegation and management.
37. Mrs Godfrey and Mrs Smith acknowledged that Mrs Sharp had been very supportive of them both in their roles. She assisted them in training, had arranged appropriate courses and was generally supportive in work related and personal matters.

Ensuring suitable premises

38. Evidence was given about a child having mud on his face when in the garden. Mrs Godfrey stated she saw Child C "playing with something yellow and he had it in his mouth." This was a nappy sack. OFSTED considers that these incidents although disputed in the detail by Mrs Sharp indicate a lack of suitable environment.
39. An incident report D81 refers to mud and mud eating. "Child D comes running in 'Child C's eaten dog poo' run outside Child C sat at flower bed playing with mud, has mud around mouth."
40. Mrs Sharp described how she inspected the premises, including the garden at the start of each day. She risk assessed locations throughout the day. She referred to the duty of each member of staff supervising children to constantly risk assess the circumstances.

Whistleblowing

41. Mrs De-Lastie and Mrs Du Preez drew attention to the need to ensure whistleblowers are able to make their concerns known. They said that OFSTED kept in mind the need to ensure Mrs Godfrey and Mrs Smith's information was not given with malicious intent. They were satisfied it was not. They acknowledged that their contacts had been inspired by an NVQ supervisor who had not herself witnessed these concerns.
42. Mrs Sharp said she was supportive of whistleblowing and drew attention to the content of courses undertaken by staff arranged by her and notices at the premises giving contact numbers for complaints.
43. Mr Sharp, Mrs Dennison and Mrs Gillet were supportive in their evidence; they had not witnessed anything of concern. In as much as they were aware of events, they confirmed Mrs Sharp's explanations.
44. Mr Toole's submissions on behalf of OFSTED include: "I would invite the Tribunal to consider the position in this way, by asking:-

'Can we completely discount the evidence of Mrs Smith and Mrs Godfrey?'

If the answer to that question is 'yes,' then it would be possible to determine that a child would not be exposed to a risk of harm if the provision of childcare continued. However, if the Tribunal cannot completely discount the evidence of the two lay witnesses, then the decision **must** be that a child *may* be exposed to a risk of harm (which is the relevant test). I would submit that the Panel have heard nothing during two days of evidence that could lead someone to confidently say that Dawn Smith and Karen Godfrey are making up these allegations."

45. Mrs Sharp's closing submissions include her speculation as to why Mrs Godfrey and Mrs Smith might have made allegations. She said at the hearing Mrs Smith had been given a third verbal warning and she had discussions with Mrs Godfrey about her conduct in front of children. She suggested at the hearing that they might be proposing to commence their own childminding services. This was denied by them.

Tribunal's conclusions with reasons:

46. OFSTED's concerns arose from information provided by Mrs Godfrey and Mrs Smith. Mrs De-Lastie and Mrs Du Preez responded at the hearing and it is set out in Mr Toole's final submissions that now enquiries are complete, continued suspension would depend upon establishment of the issues they raised. OFSTED concluded on a balance of probabilities that the events had occurred. Further concerns arose from their investigations which in combination led to the decision.
47. The suspension is not necessary to allow time need further investigation; this is acknowledged to be complete and it is clear from the bundle that the evidence has been collected. This is also clear from the confirmation by OFSTED that it has reached a decision regarding cancellation of registration.
48. We accept that it was necessary for OFSTED to take "whistleblowers" concerns seriously and act appropriately on what it heard although the contacts were at least a week after the last of the alleged incidents.
49. We note Mrs Sharp cooperated with OFSTED throughout and it is clear she has pride in the service she provides and attention to the children's needs. She gave evidence of other support she gives for children and families within her care and within the community. This is consistent with the numerous letters of support she obtained from parents. Further, having heard Mrs Sharp we find that the allegations have had a significant emotional impact upon her and at the time of her interview consider she may not have presented herself clearly in her anxiety to explain what might have taken place.
50. The Tribunal had the opportunity of seeing the witnesses, hearing their evidence in chief, cross examination and responses to its own questions. This is not an instance where enquiries continue and it would be inappropriate to reach conclusions about the issues raised.
51. Mrs Godfrey and Mrs Smith's evidence in some cases gave a different account of events they reported such as the bouncy chair. We found their evidence lacking in detail with internal inconsistencies and inconsistencies with each other. They

stated they were motivated by concerns for the welfare of the children but their complaints were delayed. This was despite as we find from their own and other evidence that they were aware of contact information and whistleblowing procedures from courses and notices on the premises. They had the opportunity to pursue complaints via parents or Social Services: they did not do so. We find that Mrs Sharp was surprised by the allegations. They had not been mentioned as significant concerns at the time. We do not find their version of events reliable.

52. In the context of a relatively busy facility such as that run by Mrs Sharp improvements could always be made. Mrs Sharp has provided explanations in respect of each individual event and about her management procedures. Her explanations are plausible and persuasive and consistent with contemporary documentation. On balance of probabilities we find that a child has not been harmed in her care as alleged or that a child was at risk of harm.
53. We set out our conclusions in respect of individual allegations.

Child A

54. Noting discrepancies in the accounts given and the sight lines stated by Mrs Smith and Mrs Godfrey in their evidence, on balance of probabilities we conclude that Mrs Sharp did not place her foot on Child A's chest. We accept that he was trying to get out of the chair and took some time to settle but do not find this serious allegation proved.

Child B

55. We find that Mrs Sharp made judgements whether to refer Child B for safeguarding. We are satisfied that Mrs Sharp was aware of the situation, took an interest and ensured that a log of concerns was kept. Her judgement not to refer at that stage was acceptable. It was not then obviously necessary to make a referral.

Information to parents

56. The suggestion is that a gloss had been placed on inappropriate events in logs. Whilst a counsel of perfection might require that parents have a detailed report of everything their child does during the day, if there was neither risk nor harm, an occurrence despite it being outside routine would not warrant report. We are satisfied that those incidents mentioned as significant could be reasonably described as they were. There is no requirement that each incident be reported in the least favourable or exaggerated terms. The essential details were available for parents.

Supervision

57. Mrs Sharp's evidence showed to us she was actively involved in her business. Those incidents upon which allegations of lack of supervision were based were within the range of incidents which might happen in any Early Years setting. They were momentary, appropriate action was immediately taken without mishap being occasioned. Mrs Sharp left us in no doubt she is well aware of her ultimate responsibility.

Suitability of premises

58. In many ways Mrs Sharp's rural setting seems an ideal environment for children. We are satisfied with the detail she gave of her routine inspections, continuing risk assessments and awareness of environmental issues.

Whistleblowing

59. From the undisputed evidence above about courses and notices displayed on the premises we conclude that Mrs Sharp did not seek to suppress complaints or concerns. She is clearly a forceful character but the evidence does not indicate any refusal to listen to staff.

Order

60. For the above reasons Mrs Sharp's appeal succeeds and her suspension is cancelled.
61. We note OFSTED will review current and subsequent suspensions. Should Mrs Sharp recommence her business as we hope, it will be necessary for the parties to work together to ensure concerns do not arise. From the testimonials provided we believe Mrs Sharp is a valuable resource for parents within the community.

Mr Laurence Bennett (Tribunal Judge)
Ms Heather Reid (Specialist Member)
Mr Mike Flynn (Specialist Member)

Date: 27 August 2014